SEP 8 - 2006

No. 06-40

IN THE

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* UNITED STATES JUSTICE FOUNDATION, CALIFORNIA STATE ASSEMEMBLYMAN RAYMOND HAYNES, CALIFORNIA STATE ASSEMBLYMAN CHUCK DEVORE, EAGLE FORUM OF CALIFORNIA, OPERATION RESCUE, FORMER MAYOR OF THE CITY OF SAN DIEGO ROGER HEDGCOCK, VICE MAYOR FOR THE CITY COUNCIL OF LA MESA BARRY JANTZ, THE CITIZENS UNITED FOUNDATION, AND THE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONER

GARY G. KREEP *
D. COLETTE WILSON
VICKI ROTHMAN
UNITED STATES JUSTICE FOUNDATION
932 "D" St., Suite 3
Ramona, California 92065
(760) 788-6624

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 06-40

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* OF: UNITED STATES JUSTICE FOUNDATION, CALIFORNIA STATE ASSEMBLYMAN RAYMOND HAYNES, CALIFORNIA STATE ASSEMBLYMAN CHUCK DEVORE, EAGLE FORUM OF CALIFORNIA, OPERATION RESCUE, FORMER MAYER OF THE CITY OF SAN DIEGO ROGER HEDGCOCK, VICE MAYOR FOR THE CITY COUNCIL OF LA MESA BARRY JANTZ, THE CITIZENS UNITED FOUNDATION, AND THE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONER

Amici move pursuant to 37 of the Rules of this Court for leave to file the accompanying brief as *amici curiae* in support of Petitioner. This brief is submitted with the consent of the Petitioner, whose consent letter has been lodged with the Clerk of the Court. The Respondent, through its counsel, refused to grant permission for the filing of this brief.

Attorney of Record, Gary G. Kreep, of the United States Justice Foundation (hereinafter, "USJF"), has reviewed the pleadings in this action and is familiar with the issues involved and the scope of their presentation.

USJF is a nonprofit corporation organized under the laws of the state of California and dedicated to the preservation of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy. USJF has represented numerous parties in cases involving constitutional concerns arising from the enactment of various state and municipal laws.

In 1995 USJF supported the Boy Scouts with an *amicus curiae* brief (written by then-USJF board member James V. Lacey) to the California Supreme Court in *Randall v. Boy Scouts of America, Orange County Council, Inc.*, 17 Cal 4th 736 (1998), a case challenging the Scouts' right to exclude atheist members. The California Supreme Court overturned two lower court decisions in determining that the Unruh Civil Rights Act, a public accommodations law, did not apply to the Boy Scouts. Many of the facts and issues of this case parallel those in the *Randall* case.

Amici believe that the outcome of the case at bar will have far-reaching results in California, as legislation is being enacted during every legislative session calling into question the rights of faith-based organizations to uphold their own ideological requirements without foregoing public benefits.

Respectfully submitted,

GARY G. KREEP *
D. COLETTE WILSON
VICKI ROTHMAN
UNITED STATES JUSTICE
FOUNDATION
932 "D" St., Suite 3
Ramona, California 92065
(760) 788-6624

* Counsel of Record

Counsel for Amici Curiae

September 8, 2006

QUESTIONS PRESENTED

The City of Berkeley has disqualified the Berkeley Sea Scouts from the City's program allowing free berthing at the Berkeley Marina for community-oriented nonprofit organizations, necessitating that Petitioner Evans personally pay the berth fees. The Sea Scouts have been excluded because of their affiliation with the Boy Scouts of America, and because the City contends that the Boy Scouts' belief-based membership policies conflict with City anti-discrimination rules.

1. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoints or associations (and actual adherence to those viewpoints and associations), violate the First Amendment freedom of belief and association?

2. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoint or associations (and actual adherence to those viewpoints and associations), violate equal protection of the laws under the Fourteenth Amendment and the principle that government must be viewpoint neutral in allocating benefits and making public facilities available?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. THE COURT SHOULD GRANT REVIEW BECAUSE THE CITY OF BERKELEY HAS USURPED TO ITSELF THE RIGHT TO DETERMINE WHICH INSTITUTIONS ARE CHARITABLE FOR THE PURPOSE OF RECEIVING A PUBLIC BENEFIT	5
II. THE COURT SHOULD GRANT REVIEW BECAUSE THE BERKELEY ORDINANCE IS AN IMPROPER USE OF A PUBLIC ACCOMODATIONS REGULATION	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Bob Jones University v. U.S., 461 U.S. 574, 103 S.Ct. 2017 (1983) 6, 7, 8, 9
Boy Scouts of America v. Dale, 530 U.S. 640, 120 S.Ct. 2446 (2000) 10
Randall v. Boy Scouts of America, Orange County Council, Inc., 17 Cal. 4th 736 (1998) 11
Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S.Ct. 3244 (1984) 9, 10

FEDERAL STATUTES

26 U.S.C. § 501 (c)(3) 5, 6, 7
36 U.S.C. §§ 30901-30908 6
U.S.C.A. Const. Amend. XIII 8

NON-FEDERAL STATUTES

Berkeley *Municipal Code* Chapter 13.28.010 6
Berkeley *Municipal Code* Chapter 13.28.060(A)(3) 12
California *Government Code* § 11135 13
California *Civil Code* § 51 (Unruh Act) 11, 12, 13

LEGISLATIVE ENACTMENTS

California SB # 1441 13

MISCELLANEOUS

http://cal-sailing.org/bottle/2002/Aug.html 6
http://www.leginfo.ca.gov/ 14

IN THE

Supreme Court of the United States

No. 06-40

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF AS *AMICI CURIAE* OF: UNITED STATES JUSTICE FOUNDATION, CALIFORNIA STATE ASSEMBLYMAN RAYMOND HAYNES, CALIFORNIA STATE ASSEMBLYMAN CHUCK DEVORE, EAGLE FORUM OF CALIFORNIA, OPERATION RESCUE, FORMER MAYER OF THE CITY OF SAN DIEGO ROGER HEDGCOCK, VICE MAYOR FOR THE CITY COUNCIL OF LA MESA BARRY JANTZ, THE CITIZENS UNITED FOUNDATION, AND THE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI*[1]

Amici seek to insure that state and local, activist, law-makers—in their zealous attempts to "protect" a vocal minor-

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief.

ity—do not enact legislation designed to compel acceptance of the homosexual lifestyle through financial chastisement of groups who disagree with Berkeley's requirements, based on ideological grounds. These state and local government agencies have erroneously equated this lifestyle choice to a special, protected, status, unmatched by any other protected class under any American law. Municipalities such as Berkeley have thus wielded their power as lawmakers to force private groups to endorse and condone *beliefs and behavior* in the name of advancing "civil rights."

The United States Justice Foundation (hereinafter, USJF) is a nonprofit corporation organized under the laws of the State of California and dedicated to the preservation of civil and human rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to seek redress for significant acts of injustice, but also to promote valuable public policy matters.

California State Assemblyman Raymond S. Haynes has represented 800,000 Californians in the California Legislature and was first elected in 1994. In 1996, former Senator Haynes was elected by the Senate Republican Caucus to serve as Republican Whip. In that position, he was responsible for generating Republican analyses for the thousands of bills that reached the California State Senate Floor.

California State Assemblyman Chuck DeVore represents over 450,000 constituents in California from Orange County. Prior to his election to the Assembly in 2004, he worked in the private sector. From 1991 to 1996, Assemblyman DeVore served as a City Commissioner for the City of Irvine, California. He was Chairman of the Irvine Community Services Commission from 1994 to 1995 and Vice Chairman the year before. He has seen the effects of local legislation on businesses and represents Californians who believe in maintaining the freedoms originally intended by the Founding Fathers.

Eagle Forum of California is a division of its parent organization, Eagle Forum, a long-standing, nonpartisan, nonsectarian organization of men and women who believe in God, family, and country. Their mission is dedicated to preserving the political, economic, moral, and social principles upon which our nation was founded.

Operation Rescue, a national organization dedicated to restoring legal personhood status to the unborn, understands the impact of the law on deeply held religious beliefs. Operation Rescue has been involved in legal controversies related to expression of personal convictions and viewpoints.

Vice Mayor of the La Mesa, California, City Council Barry Jantz is actively involved with review of local legislation in his city and is Chief of Staff to Assemblyman Jay LaSuer, who represents the 77th Assembly District.

Roger Hedgecock, a California attorney and former Mayor of the City of San Diego, has received an award for Outstanding Service from the Boy Scouts. His radio show has hosted several forums for discussion on the local lawsuit involving the Boy Scouts and their lease with the City of San Diego. He has a personal interest in the preservation of the Boy Scouts' discretion in establishment of their private policies.

Citizens United Foundation is a nonprofit, nonpartisan, educational organization established to conduct research and to inform the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution.

Howard Jarvis Taxpayers Association is a tax-exempt organization, like the Sea Scouts. They are a California-based, legislative-watch organization, constantly monitoring

state legislative action for violations of constitutional protections and communicating this information to their membership statewide.

All *amici* have concerns that the holding of the California Supreme Court in this case, if left unchecked, will set a precedent for other government entities to enact similar laws designed to pressure faith-based charities to disregard their sincerely held religious beliefs or else forego receiving any sort of governmental financial benefit.

The misapplication of similar state and local laws to faith-based institutions will have a crippling effect on many worthwhile organizations and will harm local communities and society as a whole. *Amici* urge the Court to grant the petition.

SUMMARY OF THE ARGUMENT

This case presents the questions of whether the City of Berkeley has violated the First Amendment's guarantee of freedom of belief and association and the Fourteenth Amendment's guarantee of equal protection under the law, by denying access to an otherwise obtainable government benefit on the basis of holding a particular, "undesirable" viewpoint and right of association that Berkeley has decided should be eradicated.

Berkeley's ordinance improperly usurps to local government Congress's role of defining which organizations enjoy charitable status for the purpose of receiving a public benefit.

In this brief, *amici* focus on the following: (1) Local governmental entities cannot mandate "doctrines" to be accepted by charitable and religious organizations. By withholding a financial benefit from otherwise qualifying charities that refuse to compromise their ideologically based practices, the City of Berkeley has, in essence, nullified an entity classification that has been designated by Congress. (2) Unlike

typical public-accommodations regulations, which are not applicable to noncommercial charities, Berkeley's ordinance effectively targets noncommercial charities opposed to homosexuality on ideological grounds. The law in question is part of a growing trend to use such measures, purportedly to eliminate "discrimination" against homosexuality, to essentially discriminate against faith-based organizations.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE CITY OF BERKELEY HAS USURPED TO ITSELF THE RIGHT TO DETERMINE WHICH INSTITUTIONS ARE CHARITABLE FOR THE PURPOSE OF RECEIVING A PUBLIC BENEFIT

Congress has defined a charity in order to promote the benefits that charities contribute to society. The *Internal Revenue Code* has provided tax-exempt status for:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501 (c) (3).

Congress has so defined and promoted charities because, as this Court said in *Bob Jones University v. U.S.*, 461 U.S., 574, 591-592, 103 S.Ct. 2017, 2028 (1983):

> "Charitable tax exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."

To be entitled to tax-exempt status under § 501(c)(3), an organization must first fall within one of the categories specified by Congress, and, in addition, must serve a valid charitable purpose. *Id. at* 592, 103 S.Ct. at 2028-29. The Sea Scouts meet the requirements explicitly defined by Congress. Moreover, their parent organization, the Boy Scouts, is federally chartered under 36 U.S.C. §§ 30901-30908, Title 36 being the code section dedicated to "Patriotic Societies and Observances." The charitable status conferred on the Scouts—one that has been defined by Congress—is now being thwarted by the higher threshold required by the City of Berkeley.

Although, on its face, the local ordinance does not violate federal law, it is unconstitutional as applied to the Scouts herein. Berkeley alleges that the other groups using the marina, the Berkeley Yacht Club, the Cal Sailing Club and the Nautilus Institute, have all have agreed not to discriminate on the basis of sexual orientation and, therefore, are entitled to the free berth space.[2] What Berkeley and the lower courts

---

[2] Although there are six prohibited bases for discrimination under Berkeley *Municipal Code* Chapter 13.28.010—race, color, religion, sex, national origin, and sexual orientation—in deciding which organizations are barred from receiving free berth space, Berkeley is apparently more adamant about protecting atheists and homosexuals than other protected classes. The Cal Sailing Club has sponsored a women-only sailing clinic. (Described at http://cal-sailing.org/ bottle/2002/aug.html.)

have not considered, however, is that these other groups do not hold an organizational position on one's duty to God and sexual morality as part of their foundational beliefs as the Scouts do. The Scouts' policies regarding atheists and homosexuals in membership and leadership go to the core of their philosophy.

The effect of conditioning receipt of a benefit on adherence to the ordinance in question is to promote some organizations while stifling others. The City justifies itself by essentially deciding that an organization is *per se* not a charity unless it is: (a) indifferent to whether its participants profess a belief in God or not and is (b) morally unopposed to homosexuality. Here, Berkeley is *redefining* the federal government's classification of a charity.

If Berkeley is permitted to continue using its local ordinance to deny public benefits, such as the free berth space, to 501(c)(3) organizations that would otherwise qualify to receive them, then any state or local government can promote favored organizations and stifle disfavored organizations by simply "redefining" who is entitled to charitable status—and who is not—through its own, mandatory standards. This will result in a patchwork of unequal, politically discriminatory standards as to what constitutes a charity, instead of the politically neutral, universal standard now set by Congress.

The contention that Berkeley makes, that the racial discrimination found in *Bob Jones, supra,* is analogous to the anti-atheist and anti-homosexual discrimination alleged in this case, is faulty and distinguishable. In *Bob Jones*, this Court held that in the event drastic measures are taken to revoke the tax-exempt status of an organization, thereby financially disciplining that organization, the highest level of public policy must have been offended. As this Court declared:

> "We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters, with serious im-

> plications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates *deeply* and *widely accepted* views of elementary justice." *Id.* at 592, 103 S. Ct. at 2029 (emphasis added).

The ongoing struggle to end racial discrimination in this country, in the aftermath of ending slavery, has been a key element of our shared history since 1865, upon the ratification of the 13th Amendment. Section 1 of that amendment provides that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction" and, in Section 2, that, "Congress shall have power to enforce this article by appropriate legislation." *U.S.C.A. Const. Amend. XIII.*

The will of the majority, through Congress, to rectify the badges and incidents of slavery has been acknowledged nationally, thus launching the passage of the Civil Rights Act of 1964 and the establishment of a number of foundations and organizations to make progress in the advancement of racial desegregation and the elimination of racial prejudice. In *Bob Jones*, the school's policy prohibiting interracial dating, although founded on a sincerely held religious belief, which is normally afforded the highest level of constitutional protection, violated the longstanding, profound, and widespread public commitment to the eradication of the badges and incidents of slavery. For these reasons, based on a very narrow and different set of circumstance than those presented here, this Court permitted the revocation of Bob Jones University's tax-exempt status. *Bob Jones, supra*, 461 U.S. at 592, 103 S. Ct. at 2029.

In contrast to the view at issue in *Bob Jones*, that racial bigotry is socially harmful and morally reprehensible, the position advanced by Berkeley's ordinance—that homosexual conduct is socially beneficial and morally acceptable—is a deeply controversial and widely rejected view, particularly among faith-based organizations.

To equate moral reservations against homosexuality with racial bigotry is a leap of monumental proportions. Should the argument that the two are similar for constitutional scrutiny hold, all faith-based organizations that subscribe to a contrary position will be deemed to violate a fundamental right. Thus, an organization's perceived "negativity" towards homosexuality should not be dismissed as so much bigotry in analyzing whether an organization is "charitable" or not, but consideration must be given to the group's foundational ideology and purpose.

The Boy Scouts and Sea Scouts both embrace, as part of their basic ideology and philosophy, a belief in God and an oath to uphold particular moral standards. These foundational beliefs distinguish the facts here from those in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S.Ct. 3244 (1984). In *Roberts,* a Minnesota anti-discrimination act prohibited denial of access to organizations based on gender, among other criteria. The Jaycees had a policy that prohibited women in their general membership, which was challenged as a violation of the anti-discrimination act. Importantly, in upholding the act in question, this Court noted that there was no basis for concluding that admitting women as full voting members would impede the Jaycee's ability to engage in its protected activities or to disseminate its preferred views. Furthermore this Court observed:

> "The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from

> those of its existing members. *Cf. Democratic Party of United States v. Wisconsin*, 450 U.S., at 122, 101 S.Ct., at 1019 (recognizing the right of political parties to 'protect themselves from intrusion by those with adverse political principles.'" *Id.* at 627, 104 S.Ct. at 3254-3255.

Being compelled to allow women did not compromise the foundational beliefs of the Jaycees organization, unlike the case here, where compliance requires the Sea Scouts and their parent organization, the Boy Scouts, to imperil core philosophies of allegiance to God and repudiation of moral impurity, including homosexual conduct. Unlike the Jaycees' policies regarding women members, these positions are foundational to the very purpose of the Sea Scout and Boy Scout organizations. *Accord, Boy Scouts of America v. Dale*, 530 U.S. 640, 644, 120 S. Ct. 2446, 2454 ("Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members;").

The City's ordinance thus demands conformity to a highly controversial and widely rejected moral view—at odds with the foundational beliefs of the Sea Scouts and Boy Scouts—on pain of losing one's status as a "charity." While the loss of this status may appear narrow in scope (since it only applies within the City of Berkeley), as other government entities adopt similar measures, disfavored charities lose eligibility for public benefits in ever-widening venues. Thus, the power to promote or penalize favored or disfavored charities is now being wielded at every level of government—to the detriment of society as a whole—as disfavored charities are forced to either compromise their core values or cut back their programs and services.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE BERKELEY ORDINANCE IS AN IMPROPER USE OF A PUBLIC-ACCOMODATIONS REGULATION.

The Boy Scouts' policy towards atheists was previously challenged in California as a violation of the Unruh Civil Rights Act (California *Civil Code* Section 51) in a case in which two brothers were prohibited from continuing their membership for failing to participate in the religion-related portion of the scouting program. *Randall v. Boy Scouts of America, Orange County Council, Inc.*, 17 Cal. 4th 736 (1998). The trial court enjoined the Boy Scouts from barring the two atheist Cub Scouts from advancing in the organization based on the Unruh Act's prohibition against religious discrimination by business entities. On appeal from the California Appellate Court, which had affirmed the order granting the injunction, the California Supreme Court reversed and held:

> "[D]efendant's attributes and activities render the Unruh Civil Rights Act inapplicable to its membership decisions. Defendant not only is a charitable organization with a predominantly expressive social purpose unrelated to the promotion of the economic interests of its members, but offers to its members a program that is not the equivalent of a traditional place of public accommodation or amusement. Despite the organization's limited business transactions with the public, defendant does not sell the right to participate in the activities it offers to its members. For these reasons, with regard to its membership decisions, defendant is not operating as a business establishment within the purview of California's public accommodation statute." *Id.* at 744.

California *Civil Code* Section 51, the Unruh Act, by its terms applies only to business establishments. Section 51 (b) provides:

> "(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or *sexual orientation* are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all *business establishments* of every kind whatsoever." (emphasis added).

Dissatisfied with this limitation on the reach of California's public accommodation law, covering only arbitrary discrimination by business establishments, the City of Berkeley enacted its own law prohibiting *any* discrimination—whether arbitrary or ideologically motivated—based on sexual orientation. Furthermore, Berkeley's law is clearly designed to bring *nonprofit* organizations within its sweep by its application to anyone receiving a public benefit from the city. Berkeley *Municipal Code* Chapter 13.28.060(A)(3) states:

> "It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, any service, program or facility *wholly or partially funded or otherwise supported by the City* on the basis of such individual's sexual orientation." (emphasis added).

While not all non-profit organizations are exempt from compliance with the Unruh Act, those deemed to be primarily noncommercial in purpose, such as the Boy Scouts, are not subject to the Unruh Act. In contrast, by its application to *all* entities receiving whole or partial funding from the City, the Berkeley ordinance seeks to control what the Unruh Act does not—the services, programs, and facilities of noncommercial, *charitable* organizations. This is a blatant attempt to control charitable organizations that oppose homo-

sexuality on ideological grounds—at least to the extent that such organizations might otherwise have received financial support from the City of Berkeley. In other words, the City of Berkeley is not just trying to eliminate arbitrary, economically based discrimination—as with the Unruh Act—but conscience-driven, ideologically based "discrimination" by faith-based charities. The Berkeley ordinance is thus *itself* discriminatory against the ideologies and religions of faith-based charities that oppose homosexuality as part of their core beliefs and purpose.

Even worse, this type of measure is not limited to the City of Berkeley. Legislation recently enacted by the California state legislature similarly tries to circumvent the "limitations" of the Unruh Act by also reaching beyond control of commercial entities so as to similarly regulate non-commercial, charitable organizations. Like the Berkeley ordinance, this new legislation seeks to control the policies of faith-based entities established for religious or charitable purposes. California Law SB 1441, authored by homosexual activist State Senator Sheila Kuehl, was recently ratified by the State of California. This bill is an amendment to Section 11135 of the California *Government Code*, which deals with discrimination. The language reads in pertinent part:

> SECTION 1. Section 11135 of the Government Code is amended to read: 11135. (a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

> Notwithstanding Section 11000, this section applies to the California State University[3].

The above language reiterates that there shall be no "unlawful" discrimination, yet the language of the bill does not specify whether religiously motivated "discrimination" is lawful or unlawful, nor does it provide for any exceptions for religious organizations. The burden of proving the inapplicability of the statute—which will have to be litigated—is on those faith-based entities that deem themselves to be exempt from this regulation based on First and Fourteenth Amendment protections.

Other cities and states, nationwide, are similarly passing laws seeking to control—not just commercial entities—but *noncommercial, charitable* entities in their policies and practices concerning homosexuality. Again, as with Berkeley's ordinance, these laws do not just target arbitrary, economically based discrimination, but conscience-driven, ideologically based "discrimination."

The Court is urged to grant the petition because this growing trend places in jeopardy the very existence of faith-based charities that have policies and practices concerning homosexuality based on sincerely held religious convictions, and such legislation has the effect of punishing such organizations based on their beliefs. The Berkeley ordinance at issue here is clearly just the tip of the iceberg.

CONCLUSION

There is a growing threat to the very existence of faith-based charities, all in the name of eliminating unlawful "discrimination." Lawmakers at the state and local level, like the City of Berkeley in the case at hand, are wrongly usurping to themselves the role of defining which entities qualify as

---

[3] Full text available at *www.leginfo.ca.gov.*

"charities" for the purpose of receiving public benefits—defining as "noncharities" any organization ideologically opposed to homosexuality. Reaching far beyond the traditional "public accommodations" laws that target discrimination by commercial business entities, laws such as the Berkeley ordinance at issue here actually discriminate against particular ideologies in withholding public benefits from disfavored charities.

Based on all of the foregoing, the Court is urged to grant the petition for a writ of certiorari to address and resolve these issues.

Respectfully submitted,

GARY G. KREEP *
D. COLETTE WILSON
VICKI ROTHMAN
UNITED STATES JUSTICE FOUNDATION
932 "D" St., Suite 3
Ramona, California 92065
(760) 788-6624

* Counsel of Record

Counsel for Amici Curiae

September 8, 2006